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In the

SUPREME COURT OF THE UNITED STATES

October Term [redacted] 1970

WILLIAM CLYDE DEMING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES

October Term 1969

Nos. 18,594 & 19,101

WILLIAM CLYDE DEMING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William Clyde Deming prays that a Writ of Certiorari issue to review two judgments of the United States Court of Appeals, for the Sixth Circuit, entered on November 18, 1969 in two proceedings entitled William Clyde Deming, Defendant-Appellant v. United States of America, Plaintiff-Appellee, No. 18594 and William Clyde Deming, Defendant-Appellant v. United States of America, Plaintiff-Appellee, No. 19,101, both appeals from the United States District Court for the Southern District of Ohio, Western Division.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit are printed as Appendix hereto. It has not yet been officially reported.

JURISDICTION

The judgments of the United States Court of Appeals for the Sixth Circuit were entered November 18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. #1,254 (1) and 28 U.S.C. Supreme Court of the United States Revised Rules, Rules 21, 22 and 23 and Rule 52 (b), Rules of Criminal Procedure.

QUESTIONS PRESENTED

I. Validity of Search Warrant issued in one district and executed in another.

II. Validity of Affidavit supporting Search Warrant when (1) it fails to aver credibility of informer (2) fails to state underlying circumstances supporting credibility of informer (3) fails to state underlying circumstances concerning information conveyed or confirming information from independent sources.

III. Validity of Trial Court's action in severing affidavit, detaching that deficient portion under challenge, labeling it a "mere tip," declaring case to have been begun at a time subsequent to that sworn to by the affiant in five separate affidavits, and dividing the totality of document before the magistrate and re-interpreting it through information not presented to the magistrate.

IV. May an I.R.S. Special Agent, who avers wagering violations, use a civil summons to obtain toll call records to support allegations of probable cause in a criminal prosecution?

V. Does *Grosso/Marchetti* preclude introduction and use of seizures to support a Title 18, section 1952 traveling act prosecution when the necessary violations required under that act are failure to comply with the wagering statutes.

VI. Conflict in Case:

Conflict in the Opinion of the Sixth Circuit itself, i.e. Judge Celebrezze's Dissent.

Conflict in Sixth Circuit with other cases decided therein.

Conflict between the Sixth Circuit and other circuits in regard to the requirements and application of *Grosso-Marchetti* rule.

Conflict between the Sixth Circuit in this case and the Supreme Court regarding *Spinelli.*

STATEMENT OF FACTS

In Case number 18594 and 18593 Wm. Clyde Deming and Sam Di Piazza, were charged with violations of Title 18, Section 1952 USC, in seven counts, and Title 18, Section 371, in one count. They were found guilty on all counts, covering a fifteen month period on specific dates.

There is no evidence, eyeball or otherwise that Defendant Deming or Defendant Di Piazza actually used any telephones as the interstate facility. Wholesale quantities of telephone toll records, which were obtained from the Phone Companies by IRS Civil Subpoena's under authority of Title 26, Section 7602 USC, were used in evidence to infer use of the telephone in interstate activity, and additionally provided the basis of averments which an IRS Special Agent made to magistrates in two districts to support the issue of multiple Search warrants executed in the two districts. Raids thereafter netted seizures from premises in both districts, which were in evidence to support illegal wagering.

All of the foregoing, was the result according to the IRS Special Agent, who was the affiant in the multiple statements annexed to the multiple Search Warrants, in which he alleged in all that "In February of 1966, the

office of the Intelligence Division in Cincinnati, Ohio, received information that suspected bookmakers in Las Vegas, Nevada, were calling Cincinnati, Ohio telephone number 791-4793."

The foregoing information, which gave no informants, nor any allegation of credibility of source, no underlying circumstances concerning the informant or the "suspected" information conveyed became the tip for averments the Special agent affiant made in the multiple affidavits in both districts, which alleged wagering violations with the Travel Act, subsequent raid and seizures and arrest of the Defendant Deming, who was thereafter charged with an information for failure to have the wagering stamp, and seven months later with the inditements in these cases. The defendant Deming, has from the very outset, and all stages challenged the validity of the issue of the Search warrants in a number of specific areas as the record indicates.

In cases 19030 and 19101 which were originally a part of the foregoing principal case, but severed by order of the Trial Court and trial at a later date, the defendant Deming specifically raised the impact of the *Grosso/Marchetti* cases, but was overruled by the trial court, although the trial was after the *Grosso/Marchetti* cases.

DECISION IN COURT OF APPEALS

The Sixth Circuit Court of Appeals by order dated September 11th, 1969, affirmed the judgment of the District Court in the Opinion addresses itself, inter alia to the following areas of consideration:

1. The Toll Records: The opinion states the question "whether the Government's evidence of the telephone calls in question was secured by the wrongful *procurement* of the telephone records in violation of Section 605 of the Communications Act, 47 U.S.C.

#605. This question arises first with respect to whether there was probable cause for the issuance of the search warrants." (Emphasis added.)

A. The opinion answers: "We find nothing in the language or legislative history of 47 U.S.C. #605, indicating any congressional purpose to preclude the telephone company from making record of long distance toll calls. Therefore we hold that the maintenance of toll records in *the routine course* of business does not constitute "interception" of wire communications in violation of #605 and is not wire tapping." (Emphasis added.)

B. The opinion states, as to whether there was a "divulgence," (likewise forbidden under #605) that the phrase *"or on demand of other lawful authority"* (Emphasis supplied in the Opinion) clears the action of a special agent of the I.R.S. using such summons to obtain evidence for a criminal case where there was never any showing of civil investigation.

2. Sufficiency of Search Warrants.
The Opinion answers the challenge that the search warrants are invalid under *Spinelli* v. *United States,* 393 U.S. 410 and *Aguilar* v. *Texas,* 378 U.S. 108, by stating:

A. That defendant Deming urges "that there was not probable cause because the statement did not recite the name of the informer—"; which defendant Deming did not.

B. That defendant Deming invoked Spinelli, "for the proposition that the search warrant is invalid because an investigation began as a result of a tip"; which defendant Deming did not.

C. That the affidavit for a search warrant is to be judged by a trial court's finding of fact, as to when investigation began, rather than by the words in the affidavit presented to the Commissioner, and to be interpreted by the trial courts phrases about Las Vegas having "a suspected bookmaker under eyeball surveillance" and "the case was put on the shelf until June, 1966 when it was re-opened—" when neither of these phrases, nor this statement was in the affidavit.

D. That "both affidavits could be taken into account by him in determining probable cause in relation to each" (*United States* v. *Nolan,* —F.2d— (No. 18580 July 15, 1969, 6th Cir.) — a case involving two affidavits before one commissioner — whereas in this case there were the two affidavits sworn to before two different commissioners in two different jurisdictions in two different states.

E. That the source of information, sworn to by the affiant five times in five affidavits as the first sentence in each affidavit, can be converted into a "mere tip" by a trial court finding, based on courtroom evidence and the courts personal opinion as to how this case began, especially when the so-called independent information flowed directly from the "mere tip."

THE DISSENTING OPINION

(1) Directly disagrees with the majority opinion as to the IRS summons — toll call issue, and

(2) Absent these toll calls, specifically admits defendants position in regard to the faulty affidavit "without

this information, the Government could not meet the standards for probable cause established in *Spinelli* v. *United States,* 393 U.S. 410 (1969) and *Aguilar* v. *Texas,* 378 U.S. 108 (1964)."

(3) Properly states the structure of this case, with one phase flowing from another, as follows:

> "Without the toll records, the Government could not establish that a book-making network existed between Deming's telephones, DiPiazza's New Orleans telephone, and the two telephones in Lexington, Kentucky.[1] Stripped of this information, the only evidence the Government had when it went before the Commissioners was an unsupported tip from Las Vegas, Nevada, and visual surveillance which disclosed nothing more than the fact that Deming was seen *near* the Woodford Road apartment. The U. S. Supreme Court held in Spinelli that such circumstances do not establish probable cause.

REASONS FOR GRANTING WRIT

A. Petitioner states he has been deprived of his constitutional right to a fair and impartial trial because of the admission of improper evidence.

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[1] I.R.S. agents also summoned toll records for telephone numbers found in Deming's telephone records, including those for two telephone numbers used by Kuhn. Kuhn was indicted along with Appellants as a co-conspirator and convicted largely on the basis of the evidence seized in the raids on Deming's premises. This Court today affirmed his conviction, No. 19,030. Kuhn's telephone numbers were the Lexington, Kentucky telephone numbers named in the affidavits supporting the search warrants. The toll records for his numbers showed a high volume of calls to Deming's telephone numbers. Appendix, pp. 155 and 157. The toll records, which were summoned well before June of 1966, established the bookmaking network alleged in the affidavits. Assuming that an I.R.S. agent did place bets with parties at the Lexington, Kentucky, telephone number in June of 1966 as alleged in the affidavits, it was not because of his own independent investigation but because of the information contained in the toll records.

B. Petitioner states that constitutional safe-guards have been denied him by

(1) An abuse of administrative process in using civil summons to obtain toll records solely for criminal prosecution.

(2) An abuse of the protection afforded by the requirements for probable cause which demand that originating information meet the two prong test as to underlying circumstances involving the informant and the information conveyed.

C. Petitioner states that this case which violates his right to be protected from illegal searches and seizures, and his right to privacy, also has national implications that go far beyond the rights of this appellant, since in the words of Judge Celebrezze's dissent, this case violates "a deep and fundamental tradition in this country, given force through the Constitution that prevents Government agents rumaging at will into the private lives of citizens with the expectation that something useful will turn up" by condoning "the sweeping use of the #7602 summons in these cases which enabled the I.R.S. to seize knowledge of Appellants' telephone conversations."

ARGUMENT

I. VALIDITY OF SEARCH WARRANT ISSUED IN ONE DISTRICT AND EXECUTED IN ANOTHER, WITH DIFFERING ALLEGATIONS.

The Court in the evaluation of the differences in the language of the multiple affidavits comes to a conclusion that "the affidavits are identical except some additional allegations appear in some of them." It does not say which ones, nor what allegations, but it concludes "the

additional statements enhance the showing of Probable Cause, but are not necessary to establish it." It further concludes citing this Circuits *U. S.* v. *Nolan,* "the facts supplied *the* Commissioners by both affidavits could be taken into account by him in determining Probable Cause in relation to each." The fallacy of applying this finding to the Deming Case rests on the proposition of *the* Commissioner, as distinguished from two separate commissioners in different states and districts which defendants exhibits 12 and 16 conclusively show, so that there is no relationship between the affidavits before *the* Commissioner. Further, the additional allegations which this Court says appear in some affidavits, but are not necessary for a showing of Probable Cause, were actually the basis for the trial court refusing a Motion to Suppress, the Trial Judge pointing with particularity, in a colloquy with counsel, to these same allegations which he later characterizes as unnecessary statements. This irony is heightened when it will be remembered that the government used the fuller affidavit to invoke the Nicholson 6th Circuit case, claiming it to be strikingly similar to the Deming case. The opinion herein supports that view, citing the Nicholson case.

II. VALIDITY OF AFFIDAVIT SUPPORTING SEARCH WARRANT WHEN (1) IT FAILS TO AVER CREDIBILITY OF INFORMER (2) FAILS TO STATE UNDERLYING CIRCUMSTANCES SUPPORTING CREDIBILITY OF INFORMER (3) FAILS TO STATE UNDERLYING CIRCUMSTANCES CONCERNING INFORMATION CONVEYED OR CONFIRMING INFORMATION FROM INDEPENDENT SOURCES.

The challenged affidavit after identifying the affiant as a Special Agent of the I.R.S., experienced in wagering investigations, began as follows:

> "In February of 1966, the office of the Intelligence Division in Cincinnati, Ohio, received information that suspected bookmakers in Las Vegas, Nevada, were calling Cincinnati, Ohio, telephone number 791-4793. Special Agent Frank H. Pater, working under my direction and control, checked the records of the Cincinnati and Suburban Bell Telephone Company relative to 791-4793 and pursuant to a Commissioners Summons."

The affidavit further recited the name of the subscriber, location of residence, and stated: "Toll charges were found going from 791-4793" (the tip number) "to several known and suspected bookmakers in other cities."

Even before *Spinelli*, the cases leave no doubt as to the necessity for alleging the reliability or credibility of the source of information, when informant is not revealed, or when underlying circumstances pertaining to the informant or the information, are not set forth. The parade of cases supporting this proposition, which culminated in *Spinelli* v. *United States*, include *Aguilar* v. *Texas*, 378 United States 108, 21 L. ed. 2d, 273; 84 S.Ct. 1509; *Nathanson* v. *United States*, 290 U.S. 41, 78 L. ed. 159, 54 S.Ct. 11; *Giordenello* v. *United States*, 367 United States, 78 S.Ct. 1245, L. ed. 1503.

In the present case, however, these averments were omitted. The government, when challenged on this point, then developed a theory, which it sold the District Court, that the originating information was only a tip and that it had been "placed on the shelf" six months. Thereupon the District Court decided, and the Sixth Circuit, in a split opinion approved, that the originating Tip, although repeated by the affiant at the beginning of five affidavits, was not subject to the Rule of *Aguilar* and *Spinelli*.

III. VALIDITY OF TRIAL COURT'S ACTION IN SEVERING AFFIDAVIT, DETACHING THAT DEFICIENT PORTION UNDER CHALLENGE, LABELING IT A "MERE TIP" DECLARING CASE TO HAVE BEEN BEGUN AT A TIME SUBSEQUENT TO THAT SWORN TO BY THE AFFIANT IN FIVE SEPARATE AFFIDAVITS, AND DIVIDING THE TOTALITY OF DOCUMENT BEFORE THE MAGISTRATE AND RE-INTERPRETING IT THROUGH INFORMATION NOT PRESENTED TO THE MAGISTRATE.

It is axiomatic that a Commissioner may only decide the question of Probable Cause by what is placed before him by the affiant. What is brought out in evidence during a trial, can not relate back to the Commissioner's judgment on the original application. Thus it is improper for the Trial Court to point out that Probable Cause was aided by the evidence disclosed in trial. Such remarks have no place in testing an affidavit, yet this Court cites such an excerpt from the Trial Judges' findings on the Motion to Suppress in its Opinion as the basis for its conclusion.

Note 3, in *Spinelli* v. *United States,* makes this crystal clear.

> "It is, of course, of no consequence that the agents might have had additional information which could have been given to the Commissioner. 'It is elementary that in passing on the validity of the warrant, the reviewing court may consider *only* information brought to the magistrate's attention' Aguilar v. Texas, 378 U.S. 108, 109, n. 1 (emphasis in original)."

It is fundamental, established by the weight of case law authority that an affidavit for a search warrant which is initiated by a tip must allege the informant's creditability

and/or some underlying circumstances to support the informant's creditability and the information given. Otherwise the judicial officer who must exercise his own independent judgment cannot have before him enough to evaluate the tip given.

A tip, clue, data, information, lead, or whatever term is used becomes a tip when the information conveyed by the informant is acted upon by the recipient. In the Deming case, all affidavits of the affiant began with a recital, that an unknown informant, with no allegation of reliability, told the IRS in Cincinnati that in February of 1966, suspected bookmakers were calling a Cincinnati telephone number. This information was acted upon by the affiant who caused a subpoena's to be issued to the local phone company to produce the toll records, which were examined, and disclosed the subscriber to Harry Acker, in a basement apartment at 3808 Woodford Road, Cincinnati, Ohio, as well as phone numbers of other bookmakers in other cities, including the Lexington number.

At this stage was this a tip or mere curiosity of the IRS? It certainly meets the qualifications for a tip, because it imparted information, and it was acted upon. What then was lacking from a fundamental sense to bring this tip within the law, as the cases hold? It lacked an allegation of creditability of the informant, and gave no underlying circumstances to accredit the informant, on the subject of the information he conveyed. It failed then to meet the initial tests of the *Aguilar* and *Spinelli* cases, and all the underlying case law that led to the *Aguilar* rule and the *Spinelli* explanation of what *Aguilar* means.

But, the initial tip has a fundamental place in this affidavit to start with, which the affiant recognized and repeated in all affidavits in question. It cannot escape the impact of the *Aguilar* and *Spinelli* cases, by the mere expedient of changed terminology or passage of time. Both

phases of the investigation, though six months apart, were interrelated by the *tie in* or *match up* provided by the original tip, and by the further fact that the original tip

(1) Resulted in toll record search and check out of calls "to several known and suspected bookmakers in other cities."

(2) Produced the averment of "pattern of bookmaking" with Lexington.

(3) Produced the subpoenas which disclosed the Lexington numbers where "confirming" bets were placed.

All of the above took place during the so-called "on the shelf" period between Las Vegas tip and Lexington bet.

When original information is received, acted upon, provides the "tie in" or "match up" phone number and produces numbers for further investigation, numbers through which bets are made, the fundamental place of the original tip in the scheme of the events related in this affidavit cannot be ignored, called something else, nor changed by passage of time, so that it does not have to face up to what is required of an original tip under *Aguilar* and *Spinelli*.

IV. MAY AN I.R.S. SPECIAL AGENT, WHO AVERS WAGERING VIOLATIONS, USE A CIVIL SUMMONS TO OBTAIN TOLL CALL RECORDS TO SUPPORT ALLEGATIONS OF PROBABLE CAUSE IN A CRIMINAL PROSECUTION.

Judge Celebrezze's dissenting opinion states the nub of the matter by drawing the necessary distinction between the functions of a revenue agent and a special agent.

> " 'When a special agent enters the picture, it is an entirely new investigation, for a new purpose, and the civil tax liability is no longer involved. NYU. 20th Inst. on Fed. Tax 1081, 1087 (1962).'

"As mentioned above, no Revenue agent ever took part in the Government's investigation. The summoning of the telephone records, the stakeout of the Woodford Road apartment, and the seizure of all the evidence against Appellants was handled by special agents of the Internal Revenue Service whose function it is to 'investigate criminal offenses against the revenue.' This takes on crucial significance in light of the Supreme Court's holding that a summons authorized under 26 U.S.C. § 7602 cannot be used where the I.R.S. has for its purpose the obtaining of evidence for use in a criminal prosecution. *Reisman* v. *Caplin,* 375 U.S. 440 (1964); see *Boren* v. *Tucker,* 239 F.2d 767 (2d Cir. 1956); *United States* v. *DeGrosa,* 405 F.2d 926 (3d Cir. 1969); *United States* v. *Caplin,* 255 F. Supp. 805 (E. D. Mich. 1966).

"While courts have granted enforcement to the § 7602 summons where the investigation might lead to a criminal prosecution the thrust, purpose and scope of the investigation at the outset was to determine the liability of the taxpayer for taxes owed to the Government. *United States* v. *Kleckner,* 273 F. Supp. 251 (S.D. Ohio, 1967), appeal dismissed, 382 F.2d 1022 (6th Cir. 1967).

"It is a far different thing to say as the majority does in defense of the summons issued in these cases that there was 'a possibility that there would be a finding of civil tax liability.' We have a deep and fundamental tradition in this country given force through our Constitution that prevents Government agents from rummaging at will into the private lives of citizens with the expectation that something useful may turn up. Accordingly, I cannot condone the sweeping use of the § 7602 summons in these cases which enabled the I.R.S. to seize knowledge of Appellants' telephone conversations. I do not believe that the executive branch of our government is entitled to wield such power, nor can I excuse its exercise here on the ground that Government agents believed

> that the rewards flowing from their actions would more than justify their unfettered intrusion into Appellants' private lives."

Indeed, the total soundness of Judge Celebrezze's position makes his opinion more than a personal dissent. It is, as a matter of fact, in line with the position taken by this very Circuit in *Hinchcliff* v. *Clarke,* 391 F.2d 697 (6th Cir. 1966), regarding the use of evidence in a criminal prosecution which has been acquired by Special Agents of IRS under an IRS summons. That case seems to have been overlooked by the Court in its opinion in this case. However, it was not overlooked in a late article in the American Bar Association Journal, August, 1969, Vol. 55, page 731. There, on pages 732 and 733 Mr. Paul P. Lipton examines, with approval, the distinction which this circuit drew in the *Hinchcliff* case and states his logical expectation as to its application to the type of case now under consideration.

> "To date, the cases hold that the existence of a criminal tax investigation is not a bar to enforcement of a summons issued by the IRS. In *Hinchcliff* v. *Clarke,* 391 F. 2d 697 (6th Cir. 1966), however, the court of appeals premised enforcement of an IRS summons on the Government's representation that the investigation had no purpose of possible criminal prosecution. It would seem, therefore, that the Sixth Circuit may permit enforcement only upon condition that the elicited evidence not be used in a criminal prosecution.
>
> "In rejecting arguments predicated upon the alleged subversion of administrative process, most courts, including a three-judge panel within the Sixth Circuit, have accepted at face value testimony that a special agent's primary purpose is to determine the correct tax liability. Such testimony, incidentally, is con-

tradicted by the following statement in an IRS News release:

> 'Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.'

"A district court in Ohio, moreover, has castigated testimony purporting to establish that a special agent's chief concern is the correct tax liability. In *United States* v. *Kleckner* & *Logan,* 273 F. Supp. 251, 252 (S.D. Ohio 1967), the court made the following apt comment:

> '. . . the Court notes that the review of Mr. Logan's tax returns has been assigned to Max Weaver, Special Agent, Intelligence Division. The purpose of these subpoenas cannot be said to be the obtaining of financial records relevant to a civil proceeding for the collection of income tax; the discovery is directed toward the obtaining of information for the filing of a criminal action. The Court would be naive to come to any other conclusion.'

"A special agent is indeed a criminal investigator. His sole purpose is to uncover evidence supporting a criminal prosecution. The special agent concentrates on developing evidence of intent to evade tax — concealment, falsification — rather than determination of the precise amount of the deficiency. He is chiefly concerned with documenting a case for presentation in court."

The Supreme Court, in *Abel* v. *United States,* 362 U.S. 217, reaffirmed the general principle that the administrative process may not be employed as an instrument of

criminal law enforcement in lieu of regular criminal process.

This Sixth Circuit in *United States of America* v. *Detroit Vital Food, Inc.*, 407 F. 2d 570 (1969), 89 S. Ct. 1997; 89 S. Ct. 1998 now before this court, has the following language: "We do not hold that a government agency may not institute and prosecute civil proceedings on charges that may also involve a possible criminal proceeding against the same persons. We hold merely that the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property."

The Fifth Circuit, in *United States* v. *Roundtree,* 69-2 UST 9733, held that enforcement of summons was subject to proof that its purpose was not solely to build a criminal investigation.

V. DOES GROSSO-MARCHETTI PRECLUDE INTRODUCTION AND USE OF SEIZURES TO SUPPORT A TITLE 18, SECTION 1952 TRAVELING ACT PROSECUTION WHEN THE NECESSARY VIOLATIONS REQUIRED UNDER THAT ACT ARE FAILURE TO COMPLY WITH THE WAGERING STATUTES?

The Deming cases are permeated from start to finish with IRS activity of its special agents framing a basic wagering case. The Special Agent affiant was an experienced wagering tax investigator for violation of the waging tax sections, and averred almost entirely wagering violations to premise the issue of the search warrants for the complaint which charged wagering violations and the Travel Act.

Raids, seizures and an arrest was made, and the defendant thereafter was in fact charged with an Information for Failure to have the Wagering Stamp, seven months before the within title 18, section 1952 Travel Act cases. The first case, No. 18594 was tried while the *Grosso/Marchetti* cases were pending, the second, No. 19101, after the *Grosso/Marchetti* cases, where the issue was raised in the Trial Court and the same overruled.

The *Grosso/Marchetti* cases, bascially provide a defense to prosecutions for wagering violations. If the constitutional protection afforded is to be meaningful it should not be evaded by a derivative form of prosecution such as the government has used in these cases by use of the title 18, Section 1952. The Title 18, Section 1952 is not a revenue measure, but another area for the government to prosecute gamblers, by expanding the area into use of an interstate facility. Here, the facility is keyed entirely into wagering as the unlawful activity. The act defines the unlawful activity as "any business enterprise involving gambling — on which the federal excise tax has not been paid."

In all aspects of these cases the gravamen of the offenses charged to this defendant is illegal wagering activity. This is all the more apparent by the averments in support of the Search warrants that produced the toll calls for the interstate facility and the seizures for the wagering activity.

In extending the meaning of *Grosso/Marchetti* and the area of its defenses, it should be noted that it has found its way into two areas. The 7th Circuit *U. S.* v. *U. S. Coin & Currency $8,670.00,* 393 F. 2d 499, now pending in this court extends the area into a forfeiture case and concludes that even though forfeiture is a civil action, its only apparent purpose is to punish violations of the wagering statutes, and, *Marchetti* means that such violations are no longer punishable directly. "It follows that they should not be

punished indirectly." The 6th Circuit on the same question reached the opposite result by concluding *Grosso/Marchetti* did not defensively apply to matter involving the collection of tax which they concluded forfeiture was. *U. S.* v. *Dean,* 397 F. 2d 782.

In a further extension of the *Grosso/Marchetti* cases applied directly to the averments in Search warrants that produced seizures for violation of the wagering sections and the Travel Act, the U. S. District Court for Maryland in *U. S.* v. *Silbert,* 282 F.2d 635 concluded that affidavits bottomed on wagering violations to support a Title 18-1952 prosecution are eroded enough by the *Grosso/Marchetti* cases to leave insufficient foundation for the Title 18-Section 1952 prosecution.

The Deming cases in point of time cover trial before *Grosso/Marchetti* and after *Grosso/Marchetti.* This Court in the recent *Leary* case concludes that whether or not the privilege provided by the 5th Amendment defense in the *Grosso/Marchetti* cases is asserted or not, it is not waived as an available defense. *U. S.* v. *Leary,* 23 L.ed. 2, 57. This very same conclusion was reached prior in time in the 8th Circuits *Harris* v. *U. S.,* 390 F.2d 616. The Deming cases are two part, prior and after *Grosso/Marchetti* and the 6th Circuits *Graham* v. *U. S.,* 407 F.2d 1313 clearly covers the time element on the second case, while the 5th Circuits *U. S.* v. *Lucia* (9-17-69), makes retroactive the *Grosso/Marchetti* defenses to cover the 1st trial.

Clearly the impact of the decisional activity of the Courts since *Grosso/Marchetti* has been to apply broadly the constitutional guarantees afforded by the 5th amendment in cases involving wagering violations directly or collaterally where present in a realistic sense as it is in the Deming cases which are basically wagering cases, procedurally prosecuted under the Travel Act.

VI. CONFLICTS IN CASE

Conflict in the Opinion of the Sixth Circuit itself: Judge Celebrezze's Dissent.

Conflict in Sixth Circuit with other cases decided therein. *Hinchcliff* v. *Clarke,* 391 F. 2d 697 6th Circuit (1966); *United States* v. *Harris,* 412 F. 2d 796.

Conflict between the Sixth Circuit and other Circuits in regard to the requirements and application of *Grosso-Marchetti* rule.

Graham v. *United States,* 407 F.2d 1313
Silbert v. *United States,* 282 F.2d 635
United States v. *Lucia,* C.C.A. 5, September 17, 1969 (6 CLR 2, 2021)
Harris v. *United States,* 390 F.2d 616
United States v. *Dean,* 397 F.2d 782
United States v. *U. S. Coin & Currency $8,674* ("Angelini Case")
United States v. *Leary,* 23 L.ed. 57, 1969

Conflict between the Sixth Circuit in this case and the Supreme Court regarding *Spinelli.*

The Spinelli Case, *Spinelli* v. *United States,* 393 U.S. 410 (Jan. 27, 1969) and the Deming case are exactly alike in the following aspects:

1. Both are Title 18-1952 prosecutions and convictions.
2. Both defendants at every stage asserted the Constitutional Issue of the Search Warrants.
3. Both contained anonymous informants tips.
4. Both had follow-up investigation intended to "independently" corroborate original tip.
5. Both had surveillance of interstate movements of defendants.

6. Both had phone company checks for phone listing and for address.
7. Both were using an apartment in an apartment building.
8. Both were alleged to be known gamblers.
9. Both were alleged to be engaging in illegal book making.

However, the Spinelli and Deming cases differ in the following important aspects:

1. Spinelli was seen to both enter and leave the car he was using in travelling to the parking area of the apartment building. *Deming never was.*
2. Spinelli was *seen to enter the apartment building,* and to *enter the particular apartment* in the building. *Deming was never seen to do either.*
3. Spinelli was alleged to be engaging in book making, by a confidential *reliable* informant. *There is no such allegation in the Deming case.*
4. Spinelli had two phones in his apartment, identified *by the informant* by numbers *being used by Spinelli. Deming was never so identified.*

Obviously, in each case of difference, the difference favors Deming.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM J. DAMMARELL
1304 Tri-State Building
Cincinnati, Ohio 45202
Attorney for Petitioner

APPENDIX

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS For The Sixth Circuit

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Cause No. 18594 Argued and Submitted February 20, 1969.

Before: Phillips and Celebrezze, Circuit Judges and McAllister, Senior Circuit Judge.

This cause is argued by William J. Dammarell and B. H. Berg for the defendant-appellant and by Edward T. Joyce for the plaintiff-appellee, and is submitted to the court.

Cause No. 19101 Argued and Submitted June 16, 1969.

Before: Phillips and Celebrezze, Circuit Judges and McAllister, Senior Circuit Judge.

This cause is argued by William J. Dammarell and B. H. Berg for the defendant-appellant and by Philip R. Michael for the plaintiff-appellee, and is submitted to the court.

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

No. 19,101

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILLIAM CLYDE DEMING,
Defendant-Appellant.

JUDGMENT

(Filed September 11, 1969)

BEFORE: PHILLIPS and CELEBREZZE, Circuit Judges and McALLISTER, Senior Circuit Judge.

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39(b)

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

No. 18,594

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILLIAM CLYDE DEMING,
Defendant-Appellant.

BEFORE: PHILLIPS and CELEBREZZE, Circuit Judges and McALLISTER, Senior Circuit Judge.

JUDGMENT

(Filed September 11, 1969)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39(b)

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

Nos. 18,594 & 19,101

UNITED STATES OF AMERICA,
Appellee,

vs.

WILLIAM CLYDE DEMING,
Appellant.

ORDER DENYING PETITION FOR REHEARING

(Filed November 18, 1969)

Before PHILLIPS, Chief Judge, CELEBREZZE, Circuit Judge, and McALLISTER, Senior Circuit Judge.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

Nos. 19030 and 19101

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

OTTO KUHN,
Defendant-Appellant,
v.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

WILLIAM CLYDE DEMING,
Defendant-Appellant,
v.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided September 11, 1969.
(Filed September 11, 1969)

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

PHILLIPS, Circuit Judge. Kuhn and Deming appeal from their convictions under 18 U.S.C. §§ 371 and 1952 on five counts of use of interstate telephone facilities for carrying on a business enterprise of gambling in violation of state law and one count of conspiracy so to carry on that business. They were found guilty on all counts.

All claims of error raised by appellant Deming have been dealt with in *Deming* v. *United States,* No. 18,594, decided today, —— F.2d ——. They will not be discussed further.

Appellant Kuhn raises the same issue under *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, as did Deming. We find no error with respect to the search warrant.

Kuhn also alleges that the District Court erred in permitting Special Agent Carrington, who testified as to the conduct of the gambling operation, to put dates on certain bet slips which were introduced into evidence. Appellant's theory is that this was done without introducing the documents from which Carrington determined the dates. However, while the chartbooks were not introduced, the racing forms which are the original form in which the information is published were introduced into evidence. Thus Kuhn had the opportunity to test the accuracy of Carrington's testimony by comparison to the documents on the basis of which he dated the bet slips. There was no error in permitting the dating of the bet slips.

Affirmed.

CELEBREZZE, Circuit Judge, dissenting. I dissent for the reasons set forth in my dissenting opinion in *DiPiazza* v. *United States,* and *Deming* v. *United States,* decided today, —— F.2d ——. In my opinion, Government agents procured the search warrants against premises occupied by Deming and Kuhn through abuse of the administrative summons authorized under 26 U.S.C. § 7602 which resulted in a wrongful invasion of rights secured to them under § 605 of the Communications Act, 47 U.S.C. § 605.

In January of 1966, I.R.S. special agents purporting to act under the authority spelled out by Congress in 26 U.S.C. § 7602[1] summoned telephone company toll rec-

[1] Section 7602 authorizes I.R.S. agents to summon records for these purposes: "[T]o ascertain the correctness of any return where none has

ords for Deming's telephone numbers. These records disclosed calls from two telephones used by Deming to a telephone number in New Orleans, La., used by DiPiazza, and two telephone numbers used by Kuhn in Lexington, Kentucky. The agents then summoned telephone company toll records for Kuhn's Lexington numbers. These records showed a large number of calls going to Deming's two telephones. In June of 1966, on the basis of this lead, an I.R.S. special agent called Kuhn's Lexington telephone numbers and placed wagers with parties there. On July 22, 1966, Government agents obtained search warrants and simultaneously raided premises occupied by Deming and Kuhn. Appellants were convicted on the basis of the evidence seized in these raids.

Appellants moved to suppress the evidence seized. During the hearing on the motions, the I.R.S. special agent who was in charge of the investigation in these cases and led the raid against Deming's premises testified that he made his investigation "for the purpose of prosecution". In *Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964), however, the U.S. Supreme Court held that the § 7602 summons could not be used "for the improper purpose of obtaining evidence for use in a criminal prosecution." Consequently, I submit that the summons used by the Government to obtain Appellants' toll records were not "other lawful authority" within the meaning of § 605. Since I believe that the judgments should be reversed on this basis, I express no opinion regarding Appellants' contention that the U.S. Supreme Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39 (1968) and *Grosso* v. *United States,* 390 U.S. 62 (1968) bar the introduction of the evidence seized during the raid of their premises.

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been made, determine the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect to any internal revenue tax, or collecting any such liability . . . ."

Nos. 18593-18594

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

SAM (SALVATORE) DIPIAZZA,
Defendant-Appellant,
v.
UNITED STATES,
Plaintiff-Appellee.

WILLIAM CLYDE DEMING,
Defendant-Appellant,
v.
UNITED STATES,
Plaintiff-Appellee.

APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided September 11, 1969.
(Filed September 11, 1969)

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

PHILLIPS, Circuit Judge. DiPiazza and Deming appeal from their convictions under 18 U.S.C. §§ 371 and 1952 on seven counts of use of interstate telephone facilities for carrying on a business enterprise of gambling in violation of state law and one count of conspiracy so to carry on that business. They were found guilty on all counts by a jury after a lengthy trial before District Judge David S. Porter.

The voluminous evidence introduced by the Government established a large scale interstate illegal bookmaking

and layoff gambling operation. This operation was carried on by telephone between Cincinnati, Ohio, Fort Thomas, Kentucky, New Orleans, Louisiana, and other points. According to the evidence DiPiazza primarily was based in New Orleans and Deming in Cincinnati. The gambling enterprise between these two defendants was shown to have exceeded $400,000 in one month.

Appellants challenge the Government's obtaining certain telephone company long distance toll call records, the Government's use of the toll records, and the sufficiency of search warrants under which the bulk of the evidence against the appellants was seized. Other errors alleged will be mentioned later in this opinion.

In January 1966 special agents of the Internal Revenue Service at Cincinnati received a communication from the Internal Revenue Office at Las Vegas, Nevada, requesting that a telephone number be checked, information having been received that it was being called by Las Vegas bookmakers. The number was determined to be located in the basement apartment at 3808 Woodford Road, Silverton, Ohio, a Cincinnati suburb.

In June, 1966 a special IRS agent at Louisville informed the Cincinnati office that an undercover agent had placed bets with a certain person who had been using two telephones in Lexington, Kentucky. From the toll records of the Woodford Road telephone it was determined that calls had been placed from that number to the two Lexington numbers.

The telephone at 3808 Woodford was listed to Harry Acker, a fictitious listing. Surveillance by IRS agents disclosed Deming to be a frequenter of the Woodford premises. Examination of telephone company toll records, obtained by IRS summons, revealed that the telephone at 3808 Woodford and the telephone at Deming's

residence in Fort Thomas, Kentucky, had been and were being used to make numerous toll calls to persons known to be prominent bookmakers in various cities.

Based upon the affidavits of Special Agent Guy I. Wetherell, IRS Intelligence Division, search warrants were issued. The warrant for the 4808 Woodford address was issued by a United States Commissioner for the Southern District of Ohio. The warrant for Deming's residence at Fort Thomas was issued by a United States Commissioner for the Eastern District of Kentucky.

The raid on the Woodford Road property was led by Special Agent Frank Carrington, who at the time of the trial was on a Ford Foundation grant and assigned as a legal advisor to the vice squad of the Chicago Police Department. He is a licensed attorney and a graduate of the University of Michigan Law School.

Deming was present at the Woodford address when the search warrant was executed there. A paper sack was seized containing betting records that had been torn into thousands of small pieces. More than 20,000 pieces of paper were reassembled by Carrington and agents under his control. Carrington identified these reassembled documents, testifying that they included bet slips, balance sheets and "recap" sheets, all pertaining to the bookmaking and lay-off horse betting operation between Deming and other individuals, including DiPiazza. Deming conceded that each one of these reconstructed slips was written solely in his own handwriting.

A raid on Deming's residence at Fort Thomas also produced racing forms, telephone toll records and gambling paraphernalia.

The FBI raided DiPiazza's hotel room in New Orleans on January 8, 1966, which was within the period of the conspiracy charged in the indictment. Papers taken off

DiPiazza contained Deming's telephone numbers in Fort Thomas and on Woodford Road. Deming's Fort Thomas telephone had an unlisted number. It was shown in DiPiazza's papers as the equivalent of the Woodford Road telephone number. This established, in conjunction with other evidence, a connection between DiPiazza and Deming.

Toll records of the Cincinnati and Suburban Bell Telephone Company were subpoenaed and put into evidence. These are records which were maintained by the telephone company in the ordinary and normal course of its business for the Deming telephones on Woodford Road and at Fort Thomas. These records disclosed hundreds of calls, often as many as five per day, to premises occupied by DiPiazza in New Orleans, and calls to the Hilton Hotel in New York at times when DiPiazza was registered there. The search of Deming's apartment, residence and automobile produced duplicates of most of these same toll records.

We find no reversible error in the record and affirm the convictions.

1) The Toll Records

The principal issue on this appeal is whether the Government's evidence of the telephone calls in question was secured by the wrongful procurement of the telephone records in violation of Section 605 of the Communications Act, 47 U.S.C. § 605. This question arises first with respect to whether there was probable cause for the issuance of the search warrants. It is further contended that the evidence was unlawfully introduced and received at the appellant's trial.

A.

Appellants contend that the toll records of long distance telephone calls constitute an "interception" of a message in violation of section 605.

The toll records obtained by IRS in its investigation are the same type of long distance records kept by the telephone company for all telephones. These records contain substantially the same information that is furnished each month to the customer as a part of his billing, i.e., the date of the call, the destination called, the telephone number to which each call is placed, the telephone number where the call originated, and the amount of the charge for the service. These records contain no information as to the persons participating in the call or the subject matter of the conversation.

A telephone subscriber or user authorizes the telephone company to intercept his calls to the extent reasonably necessary for purposes of computing his telephone charges. See *Brandon* v. *United States,* 382 F.2d 607 (10th Cir.); *United States* v. *Gallo,* 123 F.2d 229 (2d Cir.); *United States* v. *Russo,* 250 F.Supp. 55 (E.D. Pa.).

> "To hold that recording by the company of the fact of a call between two of its telephones is an unauthorized interception of a communication would require a construction of the statute extending it beyond either its purpose or its words. The statute was not intended to proscribe long-standing, reasonable business practices of communication companies. When a person takes up a telephone he knows that the company will make, or may make, some kind of a record of the event, and he must be deemed to consent to whatever record the business convenience of the company requires. If by any stretch of language the making of such a record could be termed an 'interception' of the communication, it is one which

> the sender has authorized. Hence it is not within the ban of the statute." *United States* v. *Gallo,* 123 F.2d 229, 231 (2d Cir.).

We find nothing in the language or legislative history of 47 U.S.C. § 605 indicating any congressional purpose to preclude the telephone company from making records of long distance toll calls.

Therefore we hold that the maintenance of toll records in the routine course of business does not constitute "interception" of wire communications in violation of § 605 and is not wiretapping.

B.

Having held that the maintenance of the toll records and the making of the records does not constitute an "interception" forbidden by § 605, we now deal with the appellants' contention that the submission of the records to the IRS was a "divulgence" forbidden by § 605.

Only the first clause of 47 U.S.C. § 605 could be construed as prohibiting the telephone company from turning its records over to the Government since there was no interception of a message in violation of section 605's later clauses. The clause is as follows:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship

under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or *on demand of other lawful authority;* . . . ." (Emphasis supplied).

The Government maintains that the IRS summons was issued under 26 U.S.C. § 7602 and constituted "other lawful authority" for the divulgence of the toll records revealing the existence of the telephone calls. In an addendum to his findings of fact and conclusions of law on the defendants' suppression motions prior to the trial the District Judge held that the obtaining of the toll slips under the summons was obtaining them under "other lawful authority" within the meaning of section 605. Implicit in that holding is a finding that obtaining evidence for a criminal prosecution was not the sole purpose of the investigation. We find no evidence in the record to support a contention that this finding is in error. The appellants have not pointed out to this Court or to the District Court any evidence that the summons were improper. The agent who authorized the issuance of the summons testified as a witness at the suppression hearing, but on cross-examination the appellants did not even undertake to develop any facts to show that the summonses were issued for an unlawful purpose.

Where the investigation may produce both civil and criminal evidence, the summons under section 7602 is a proper device for obtaining records. See *United States* v. *Powell,* 379 U.S. 48; *Ryan* v. *United States,* 379 U.S. 61, aff'g 320 F.2d 500 (6th Cir.). The burden is on the party objecting to the summons to show that it was used for an unlawful purpose. See *United States* v. *Powell, supra* at 58; *United States* v. *Nunnally,* 278 F.Supp. 843 (D.C. Tenn.). That burden is not met by merely showing that the agent issuing the summons is a special agent

of the IRS. See *Powell* v. *United States, supra,* (summons to appear before special agent); *Tillotson, Special Agent, IRS* v. *Boughner,* 225 F.Supp. 45, motion denied, 327 F.2d 982, aff'd 333 F.2d 515 (7th Cir.), cert. denied, 379 U.S. 913 (Special Agent summons with unknown taxpayer); *Mullins, Special Agent, IRS* v. *Angiulo,* 227 F. Supp. 524, aff'd 338 F.2d 820 (1st Cir.), cert. denied, 380 U.S. 963 (Special Agent summons). But see *United States* v. *Kleckner,* 273 F.Supp. 251 (S.D. Ohio), appeal dismissed on motion of appellants, 382 F.2d 1022.

It should be remembered that when the earlier summons was issued the IRS had no knowledge that Deming or DiPiazza were involved. The first name disclosed in the investigation was that of Harry Acker, who was listed as the subscriber of the Woodford Road telephone number with which the investigation was begun. At the time this summons was issued IRS could not have known what kind of violations would be disclosed by the investigation. There was a possibility that there would be a finding of civil tax liability.

In our view the record establishes that the telephone company divulged its records to IRS in response to a demand of lawful authority as expressly authorized by 47 U.S.C. § 605. The summonses were issued in conformity with and pursuant to the authority of 26 U.S.C. § 7602. A finding that the furnishing of the toll records for Deming's telephones at Woodford Road and at his residence at Fort Thomas constituted a violation of 47 U.S.C. § 605 cannot be supported on this record.

In our opinion the decision in *United States* v. *Caplan,* 255 F.Supp. 805 (E.D. Mich.), relied upon by appellants, is distinguishable from the present case in at least two particulars: (1) that case involved the use of an unauthorized pen register, which, unlike making long distance

toll records, is not an activity of the telephone company consented to by the subscriber and (2) the District Judge in that case found as a fact that the IRS summons was issued to investigate possible criminal violations and not to determine civil liability. In the present cases District Judge Porter, in the addendum to his findings of facts and conclusions of law on the motion to suppress, affirmatively found that the obtaining of the long distance toll slips in response to IRS summons was pursuant to "demand of lawful authority" as that phrase is used in 47 U.S.C. § 605.

C.

The appellants contend that the toll records could only be obtained under a search warrant, citing *Katz* v. *United States,* 389 U.S. 347, and *Hanna* v. *United States,* 393 F.2d 700 (5th Cir.). We find this contention without merit. *Katz* was an electronic surveillance case in which the Government eavesdropped on telephone conversations. The Court said, "One who occupies [a telephone booth] . . ., shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." 389 U.S. at 352. He is not entitled to assume that the fact that he is making a call will be a secret. Similarly one who uses a telephone to make long distance calls is not entitled to assume that the telephone company will require a warrant before submitting its records in response to an IRS summons.

The Supreme Court recently held that *Katz* v. *United States* is "to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967." *Desist* v. *United States,* 394 U.S. 244, 254. Any eavesdropping in the present cases occurred well before that date.

Hanna v. *United States, supra,* was a case of wiretapping by the telephone company and, although the appellants did not mention it in their briefs, was written in three opinions including a dissent. The same panel reversed itself in a unanimous opinion at 404 F.2d 405.

We find no Fourth Amendment right of the appellants violated in the summoning of the toll records.

We hold that the toll records were properly obtained by the Government and were usable both as a basis for the search warrants and as evidence at trial against the appellants.

2) Sufficiency of the search warrants

Appellant Deming challenges the search warrants on the grounds that they are invalid under *Spinelli* v. *United States,* 393 U.S. 410, and *Aguilar* v. *Texas,* 378 U.S. 108; that they are supported by differing statements; and that there is a discrepancy between a date alleged in the statements and what was subsequently proved by the evidence. We find that the warrants were issued on a showing of probable cause and were in no way defective. The statement which is challenged recites the qualifications of the Special Agent making the statement and then recites the following facts on which probable cause was found by the District Court: The Cincinnati office of the IRS was informed in February 1966 (the date is discussed below) that suspected bookmakers in Las Vegas, Nevada were calling a Cincinnati telephone number. The Cincinnati IRS determined the name of the subscriber to the number and examined the toll records discussed above. In June 1966 the affiant was informed by another named Special Agent that a third named Special Agent had been making bets with a person in Lexington, Kentucky by calling two numbers there. Calls had been placed from the Lex-

ington numbers to the Cincinnati number. Calls had also been placed between the Cincinnati number and that of Sam DiPiazza, who was a nationally known bookmaker, and that of an address in Louisville, Kentucky, for which a federal wagering stamp had been issued. The affiant concluded that these telephone calls, in his judgment as an experienced investigator, showed a pattern of a bookmaking operation at the Cincinnati number on Woodford Road.

The statement further recited that the Woodford Road building had been put under surveillance and that a certain automobile, registered to Deming's mother at Deming's address in Fort Thomas, Kentucky, had been observed on eight occasions outside the building and Deming had been observed driving it. Deming was known to the affiant as a bookmaker and had been arrested for wagering law violations and had at one time had a wagering stamp. The toll records revealed a number of calls from Deming's home number to the two Lexington numbers at which the Special Agent had placed wagers.

Deming urges that this Court hold that there was not probable cause because the statement did not recite the name of the informer who told the IRS in Cincinnati in early 1966 that gamblers were calling the Cincinnati number.

In both *Aguilar* v. *Texas,* 378 U.S. 108, and *Spinelli* v. *United States,* 393 U.S. 410, the informant's information was central to the finding of probable cause. In the present case the information from the unknown informant could have been left out of the statement altogether without affecting the determination of probable cause. The information from the informant here was merely the tip which first aroused the curiosity of the IRS. The investigation did not really begin until the Cincinnati number was tied in with the telephone numbers in Lexing-

ton used by the person with whom the Special Agent was placing wagers.

Spinelli is no authority for the proposition that the search warrant is invalid because an investigation is begun as a result of a tip. Weak, anonymous and even untrustworthy information may serve as the opening clue to uncovering criminal acts. The District Judge was correct when he stated in the course of the proceedings on the motion to suppress, that: "They can get a lead in any way [so long as it is not illegal]; and if it is followed by investigation which turns up all kinds of probable cause for such as there was in this affidavit . . . it will support a judicial finding of probable cause."

In the case of *United States* v. *Nicholson*, 303 F.2d 330 (6th Cir.), cert. denied 371 U.S. 823, where this Court was faced with affidavits alleging facts similar to those in this case, we held:

> "Probable cause exists where the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Brinegar v. United States, supra, 338 U.S. 175-176, 69 S.Ct. 1302; Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327. Whether probable cause exists requires an act of judgment formed in the light of the particular situation and with account taken of all the circumstances. Because many situations are more or less ambiguous, a determination that probable cause exists should be accepted by this Court unless it is shown that the Commissioner's judgment was arbitrarily exercised. Brinegar v. United States, supra, 338 U.S. 176, 69 S.Ct. 1302; Merritt v. United States, 249 F.2d 19, 20, C.A. 6th." 303 F.2d at 332.

We hold that probable cause under this standard was es-

tablished by the factual allegations of the statements in the affidavits.

Appellant Deming complains that the statements in support of the five search warrants were not identical, that the District Court upheld the warrants on the basis of the affidavit which contained additional allegations, and that without the additional allegations there is no showing of probable cause.

The affidavits are identical except that some additional allegations appear in some of them. In our discussion above we have dealt with the most limited of the affidavits. The additional statements enhance the showing of probable cause but are not necessary to establish it.

In *United States* v. *Nolan,* —— F.2d —— (No. 18,580, July 15, 1969, 6th Cir.), this Court said:

> "We believe that consistent with the Fourth Amendment the facts supplied the Commissioner by both affidavits could be taken into account by him in determining probable cause in relation to each."

The District Court was well aware of the differences in the affidavits and did not make its decision on the basis of the fullest alone. We concur with the conclusion of the District Court that probable cause was shown in all of the affidavits.

Appellant places emphasis upon a small variation in dates between the affidavits and proof. The affidavits state that the information first was received from Las Vegas in February 1966. The evidence indicates that the Las Vegas IRS office requested in January 1966 that the telephone at 3808 Woodford Road be checked. The District Judge made no specific finding as to the date the information first was received by the Cincinnati Office from Las Vegas. In his findings of fact on the motion to suppress, he said:

"An IRS intelligence agent in Las Vegas had a suspected bookmaker under eyeball surveillance, observing him to make a number of calls from a certain phone, obtained the records regarding such calls from the telephone company, discovered one to be Cincinnati 791-4793, listed under the name of Harry Acker, 3808 Woodford Road, Silverton, Ohio.

"Investigation followed, and the case was put on the shelf until June, 1966, when it was reopened when an IRS agent from Louisville, Kentucky, advised the Cincinnati Office that the same number was being called by Lexington telephone numbers under surveillance.

"Investigation and eyeball surveillance followed . . . . ."

We find no possible prejudice to appellants growing out of the conflict in dates as between January and February 1966. This variation could not be construed to constitute reversible error.

We hold that the warrants were based on probable cause and that the material seized under them was admissible in evidence.

3) Electronic surveillance

Appellant DiPiazza frames the question with respect to electronic surveillance as:

"Did The Judge Deny To The Accused An Open Court Determination Of The Nature And Admissibility Of 'Findings' And 'Conclusions' Resulting From Some Ninety Hours Of Illegal Electronic Eavesdropping?"

We hold that DiPiazza had the opportunity to show infirmities in the Government's case resulting from electronic surveillance and that none was revealed.

A thorough pre-trial evidentiary hearing was conducted by the District Judge on defendants' motion to suppress. There was no evidence of any electronic surveillance of Deming or his telephones at the 3808 Woodford Road address or his residence at Fort Thomas. The United States filed notice, prior to the hearing, that DiPiazza had been subjected to electronic surveillance in the past and produced 35 tapes for inspection of counsel for defendants. Defendants introduced five tapes into the record. The District Court made a finding of fact that there was no connection between the earlier electronic surveillance of DiPiazza and the investigation which led up to the indictment in the present case.

After the trial a hearing was held on the problem of electronic surveillance on the appellants' petition and motion to suppress. No evidence was taken and none was offered. Counsel argued evidence which was already before the Court and declined to bring on either new witnesses or otherwise to show taint in the Government's case from illegal surveillance. The District Judge reaffirmed his previous ruling.

Thus the defendants were afforded an opportunity both before and after trial to show any taint of the Government's case, including the search warrants, by electronic surveillance. The Government demonstrated the basis of its case to be independent of electronic surveillance. The appellants failed to demonstrate taint. See *Alderman* v. *United States,* 394 U.S. 165, 183; *Nardone* v. *United States,* 308 U.S. 338, 341.

We hold that the District Court did not deny the appellants any opportunity for a hearing to which they were entitled with respect to the question of surveillance of an illegal nature.

4) Marchetti and Grosso

Deming urges that *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, require the exclusion of the evidence against him which was seized under the search warrants, because he was initially charged in an information with violation of the wagering tax laws by willful failure to pay the tax imposed by 26 U.S.C. § 4411. Subsequent to the return of the indictment on which Deming and DiPiazza were tried, the information was abandoned.

Marchetti and *Grosso,* decided after Deming's trial, do not hold that the wagering tax laws are unconstitutional. *United States* v. *One 1965 Buick,* 392 F.2d 672 (6th Cir.), petition for cert. filed, 37 U.S.L.W. 3221 (No. 619). They hold that if a criminal defendant charged with violating the wagering laws properly asserts his privilege against self-incrimination, the Fifth Amendment is a bar to the criminal prosecution. Thus, Deming could have pled the Fifth Amendment in bar of prosecution for the wagering tax violation. It does not follow that the evidence seized under the warrants must be excluded since the warrants were proper authority for the searches at the time they were issued and executed. *Washington* v. *United States,* 402 F.2d 3 (4th Cir.), petition for cert. filed, 37 U.S.L.W. 3287 (No. 831). Since the evidence was obtained under valid search warrants, there was no basis for excluding it. This conclusion also disposes of Deming's claim that he was improperly denied a hearing on a suppression motion prior to the indictment — he cannot have been prejudiced by not having a hearing at which he could not have prevailed in his motion.

We intimate no opinion on whether warrants issued after *Marchetti* and *Grosso* for wagering tax violations are valid. We hold only that *Marchetti* and *Grosso* do not require the exclusion of evidence seized prior to the decisions in those cases under otherwise valid search warrants when the

evidence is introduced to show the commission of crimes other than wagering tax violations.

5) Conclusion

Other contentions made by the appellants have been considered, and we are of the opinion that they are without merit. The District Court made no error in overruling the various motions to suppress.

Affirmed.

CELEBREZZE, Circuit Judge, dissenting. I respectfully dissent. I agree with the majority that telephone company toll records containing an individual's long distance calls are protected by § 605 of the Communications Act. The principal issue before us is whether the Government violated that section by using the § 7602 summons to obtain the telephone records that led ultimately to Appellants' convictions. If the Government did violate § 605 there was no probable cause for the search warrants. *Spinelli* v. *United States*, 393 U.S. 410 (1969). Without the toll records, the Government could not establish that a bookmaking network existed between Deming's telephones, DiPiazza's New Orleans telephone, and the two telephones in Lexington, Kentucky.[1] Stripped of this information, the only evidence the Government had when it went before the

[1] I.R.S. agents also summoned toll records for telephone numbers found in Deming's telephone records, including those for two telephone numbers used by Kuhn. Kuhn was indicted along with Appellants as a co-conspirator and convicted largely on the basis of the evidence seized in the raids on Deming's premises. This Court today affirmed his conviction, No. 19,030. Kuhn's telephone numbers were the Lexington, Kentucky telephone numbers named in the affidavits supporting the search warrants. The toll records for his numbers showed a high volume of calls to Deming's telephone numbers. Appendix, pp. 155 and 157. The toll records, which were summoned well before June of 1966, established the bookmaking network alleged in the affidavits. Assuming that an I.R.S. agent did place bets with parties at the Lexington, Ken-

Commissioners was an unsupported tip from Las Vegas, Nevada, and visual surveillance which disclosed nothing more than the fact that Deming was seen near the Woodford Road apartment. The U.S. Supreme Court held in *Spinelli* that such circumstances do not establish probable cause.

I cannot agree with the majority's conclusion that the Internal Revenue summons that were used to obtain the toll slips were "other lawful authority" within the purview of § 605. I am of the opinion that the record clearly establishes that Government agents used the summons for the sole purpose of procuring evidence to prosecute and convict Appellants of conspiracy to violate, and of violating federal criminal statutes. This is contrary to the U.S. Supreme Court's holding in *Reisman* v. *Caplin,* 375 U.S. 440 (1964), where the Court said that the Government could not use the § 7602 summons for that purpose.

When the Government conducts searches for evidence of crime it must proceed by lawful authority. No less is required under § 605 which embodies a congressional mandate that the privacy of telephone users shall be free from arbitrary invasion by government officials. Consequently, the U.S. Supreme Court has held that when such an invasion does take place evidence seized as a result may not be used in a criminal prosecution against the parties to the communication, in these cases, Deming and DiPiazza.[2] These holdings accord with the rule excluding

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tucky telephone numbers in June of 1966 as alleged in the affidavits, it was not because of his own independent investigation but because of the information contained in the toll records.

[2] And Kuhn in No. 19,030, *Nardone* v. *United States,* 302 U.S. 379 (1937); on second appeal, 308 U.S. 338 (1939); *Goldstein* v. *United States,* 316 U.S. 114 (1942). The term "sender" has been held to include both parties to the telephone conversation. *United States* v. *Tane,* 329 F.2d 848 (2d Cir. 1964); see *Rathburn* v. *United States,* 355 U.S. 107, 113 (1957) (Dissenting opinion of Frankfurter, J.).

evidence seized in violation of the Fourth Amendment, to which § 605 has often been equated.[3]

The record in these cases establishes that Goverment agents obtained the evidence which led to Appellants' indictments and convictions through an indiscriminate abuse of civil process, the § 7602 summons.

The majority opinion states that "[t]he F.B.I. raided DiPiazza's hotel room in New Orleans on January 8, 1966, which was well within the period charged in the indictment." It is important to note that the F.B.I. raided DiPiazza's hotel room one month before the Government received its alleged Las Vegas information concerning Deming's Woodford Road telephone number. It is also important to note that the Government admitted during the hearing on the motion to suppress that electronic surveillance had been conducted against DiPiazza by both the F.B.I., which arrested DiPiazza, and the I.R.S., which arrested Deming, his co-conspirator.

Upon the arrest of DiPiazza on January 8, 1966, the F.B.I. obtained from his person papers containing Deming's Woodford Road telephone number. Although the I.R.S. informed the Commissioners that it summoned Deming's telephone toll records (Woodford Road) in February of 1966, supposedly at the request of its Las Vegas office, evidence developed that these toll records were summoned in January of 1966. The chronology of events in these cases emerges as follows: The F.B.I. and the I.R.S. electronically monitored DiPiazza's conversations; F.B.I. agents raided DiPiazza's hotel room in January of 1966 and seized Deming's Cincinnati, Ohio telephone number; I.R.S. agents summoned the toll records for that number in the same month, procured search warrants on the basis

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[3] *Goldstein* v. *United States*, 316 U.S. 114 (1942); see generally *Katz* v. *United States*, 389 U.S. 347 (1947).

of the information contained in them, and seized the evidence that led to Appellants' convictions for violating wagering statutes and for conspiring to do so.

In overruling Appellants' motions to suppress, the District Judge found that the joint F.B.I.-I.R.S. electronic surveillance did not lead to the indictments against them. He found that the Las Vegas information did. Although some argument during the hearing on the motion to suppress was devoted to the use of the § 7602 summons in obtaining the toll records, the Government did not at any time allege that the investigation conducted by its agents had civil tax ramifications.

Coming to the propriety of the Government's use of the § 7602 summons, even if we assume that the joint electronic surveillance did not lead the Government to the evidence used to convict Appellants, which is, I believe, a highly questionable assumption, it is abundantly clear that the F.B.I. and the I.R.S. were not interested in Appellants' civil federal income tax liability. Special I.R.S. agent Wetherill, who obtained the search warrants, revealed as much during the hearing on the motion to suppress. In the colloquy that follows, Appellants' counsel was attempting to ascertain from Wetherill how he knew that DiPiazza was a "nationally known bookmaker" as he had alleged in the affidavits supporting the search warrants:

> "Q. Now, again I ask you what makes a suspected bookmaker.
>
> A. Suspected bookmaker is a person that I believe to be engaged as a bookmaker.
>
> Q. But who does not have a stamp, does not pay an excise tax and who has not been convicted; is that correct?
>
> A. Yes, sir.
>
> Q. Now, explain to me why you refer to Sam DiPiazza, who has not been arrested, not been con-

victed and who has never had a stamp as a nationally known bookmaker? Look at your affidavit and tell me why you made such a statement.

Mr. Michael: I object to one part of the question if it said he has never been arrested. We have information to the contrary.

Mr. Johnson: May I rephrase the question, I didn't mean to say arrested.

The Court: Forget the arrested.

Q. Do you know whether or not he has ever had a stamp?

A. No, sir.

Q. Have you ever checked it?

A. No, sir.

Q. Do you know whether or not he has ever paid excise tax?

A. No, sir.

Q. Have you ever checked it?

A. No, sir.

Q. Have you ever checked whether he has ever been convicted?

A. No, sir.

Q. However, you swear he is a nationally known bookmaker?

A. For the years I have been in the Service, for these years I have been in the Service I have heard and been told that Sam DiPiazza is a bookmaker."[4]

But there is more than the subjective intent of the agents in these cases to show that this was from start to finish a criminal investigation. The I.R.S. Special Agent, like Wetherill and all of the agents who participated in these cases, does not assess civil tax liability. He, like

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[4] As the U.S. Supreme Court said in *Spinelli* v. *United States*, 393 U.S. 410, 418-419 (1969), "a simple assertion of police suspicion" that someone "was known . . . as a gambler" may not provide a basis for a finding of probable cause for a search warrant nor "be used to give additional weight to allegations that would otherwise be insufficient". See *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

his agent colleague in the F.B.I., has a far more grave responsibility:

> "A special agent is a criminal law enforcement officer, and just like any state or municipal detective or policeman." N.Y.U. 20th Inst. on Fed. Tax 1081, 1087 (1962).

Congress has authorized the Commissioner of Internal Revenue to investigate both civil and criminal offenses against the revenue. The first of these functions is carried out by the revenue agent who is usually assigned to the Service's Audit Division. His job is to see that taxpayers accurately report their income and pay the tax owing on it. The special agent, on the other hand, is assigned to the Service's Intelligence Division. His function, as stated above, is to investigate criminal offenses against the revenue. *Wild* v. *United States,* 362 F.2d 206 (4th Cir. 1966). When a taxpayer may be subject to increased liability for taxes as well as criminal penalties, the revenue agent and the special agent will work together in a joint investigation. Thus, for example, where a revenue agent suspects fraud on the part of a taxpayer that would deprive the Government of tax dollars and possibly subject the taxpayer to criminal penalties, he will call in the special agent:

> "When a Special agent enters the picture, it is an entirely new investigation, for a new purpose, and the civil tax liability is no longer involved." NYU. 20th Inst. on Fed. Tax 1081, 1087 (1962).

As mentioned above, no Revenue agent ever took part in the Government's investigation. The summoning of the telephone records, the stakeout of the Woodford Road apartment, and the seizure of all the evidence against Appellants was handled by special agents of the Internal Revenue Service whose function it is to "investigate

criminal offenses against the revenue." This takes on crucial significance in light of the Supreme Court's holding that a summons authorized under 26 U.S.C. § 7602 cannot be used where the I.R.S. has for its purpose the obtaining of evidence for use in a criminal prosecution. *Reisman* v. *Caplin,* 375 U.S. 440 (1964); see *Boren* v. *Tucker,* 239 F.2d 767 (2d Cir. 1956); *United States* v. *DeGrosa,* 405 F.2d 926 (3d Cir. 1969); *United States* v. *Caplin,* 255 F.Supp. 805 (E.D. Mich. 1966).

I believe that the majority paints with too broad a brush when it says that the courts will grant enforcement to the § 7602 summons "[w]here the investigation may produce both civil and criminal evidence." The cases that the majority cite in support of that statement, namely, *United States* v. *Powell,* 379 U.S. 48 (1964), and *Ryan* v. *United States,* 379 U.S. 61 (1964), say that the Commissioner must show that the investigation is "pursuant and relevant to" a legitimate purpose, which is, in the language of § 7602:

> "[To] ascertain the correctness of any return where none has been made, determine the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability . . . ."

I submit that none of these purposes were present here. See *Boren* v. *Tucker,* 239 F.2d 767 (9th Cir. 1956).

While courts have granted enforcement to the § 7602 summons where the investigation might lead to a criminal prosecution the thrust, purpose and scope of the investigation at the outset was to determine the liability of the taxpayer for taxes owed to the Government. *United States* v. *Kleckner,* 273 F.Supp. 251 (S.D. Ohio, 1967), appeal dismissed, 382 F.2d 1022 (6th Cir. 1967).

It is a far different thing to say as the majority does in

defense of the summons issued in these cases that there was "a possibility that there would be a finding of civil tax liability." We have a deep and fundamental tradition in this country given force through our Constitution that prevents Government agents from rummaging at will into the private lives of citizens with the expectation that something useful may turn up. Accordingly, I cannot condone the sweeping use of the § 7602 summons in these cases which enabled the I.R.S. to seize knowledge of Appellants' telephone conversations. I do not believe that the executive branch of our government is entitled to wield such power, nor can I excuse its exercise here on the ground that Government agents believed that the rewards flowing from their actions would more than justify their unfettered intrusion into Appellants' private lives.

While I am in accord with the ultimate goal of law enforcement agencies in stamping out organized crime in this country, these agencies must nevertheless proceed in a manner consistent with existing court decisions, congressional mandate, and constitutional limitations. It is my opinion that they have failed to do this.

Since it is my belief that the sole purpose of the investigation in these cases was to gather evidence for use against Appellants in a criminal prosecution, I submit that the § 7602 summons were not "other lawful authority" within the meaning of § 605 of the Communications Act. Accordingly, the information found in the toll slips could not be disclosed to the Commissioners. 47 U.S.C. § 605; *Alderman* v. *United States,* 394 U.S. 165 (1969). Without this information, the Government could not meet the standards for probable cause established in *Spinelli* v. *United States,* 393 U.S. 410 (1969), and *Aguilar* v. *Texas,* 378 U.S. 108 (1964).

I would therefore reverse.